TENAGA NASIONAL BHD v. MALAYSIAN RESOURCES CORPORATION BHD & OTHER CASES

HIGH COURT MALAYA, KUALA LUMPUR
NADZARIN WOK NORDIN J
[ORIGINATING SUMMONS NOS: WA-24C-170-09-2022, WA-24C-171-09-2022 & WA-24C-172-09-2022]
11 DECEMBER 2023

Abstract – *The words 'dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the court', as per s. 37 of the Construction Industry Payment and Adjudication Act 2012, does not put any restriction to either the adjudication, arbitration or court proceedings to be limited by the word 'concurrently'. Therefore, an adjudication proceeding can be commenced even after the commencement of an arbitration proceeding.*

CONSTRUCTION LAW: *Adjudication – Setting aside – Adjudication granted sum of RM15,537,694.33 together with interest and costs – Adjudication proceedings commenced after commencement of arbitration proceedings – Whether adjudication proceedings could be commenced after commencement of arbitration proceedings pursuant to s. 28 of the Construction Industry Payment and Adjudication Act 2012 – Whether adjudicator acted in excess of jurisdiction – Whether adjudicator breached natural justice*

WORDS & PHRASES: *'dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the court' – Construction Industry Payment and Adjudication Act 2012, s. 37 – Whether either arbitration, adjudication or court proceedings ought to be limited by word 'concurrently' – Whether adjudication proceedings could be commenced after commencement of arbitration proceedings*

Tenaga Nasional Bhd ('TNB') and Malaysian Resources Corporation Bhd ('MRCB') were involved in a development project. There was an arbitration proceeding for claiming payments, commenced between the two parties in respect of the said project. More than two years after the issuance of the certificate of practical completion (CPC) of the project, MRCB initiated five adjudication proceedings pursuant to the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') against TNB. One of it was the Adjudication Reference No. AIAC-D-ADJ-4189-2022 ('AD') which MRCB was granted a sum of RM15,537,694.33 together with interest and costs ('adjudication decision') by the adjudicator. The present three originating summonses were filed in response to the said AD. In Originating Summons

No: WA-24C-170-09-2022 ('OS 170'), TNB sought to set aside the adjudication decision by virtue of s. 15(b) and/or (d) of the CIPAA. In Originating Summons No: WA-24C-171-09-2022 ('OS 171'), TNB sought to stay the adjudication decision pending the outcome of OS 170 and/or the final disposal of another arbitration proceeding commenced by MRCB against TNB, *ie*, Arbitration Proceedings Reference No: AIAC-D-ADM-1084-2022. Whereas in Originating Summons No: WA-24C-172-09-2022 ('OS 172'), MRCB sought to enforce the adjudication decision as though it was a court judgment pursuant to s. 28 of the CIPAA. The issues raised in respect of the said originating summonses were: (i) whether the adjudicator had the absolute jurisdiction to hear the matters in the payment claim as s. 37 of the CIPAA does not permit adjudication proceedings to be commenced after the commencement of arbitration proceedings; (ii) whether the adjudicator in excess of jurisdiction when he: (a) considered the payment claim issued by MRCB for OS 170 was not in compliance or within parameters of s. 5(2) of the CIPAA and one of the category of claims advanced by MRCB did not fall within the definition of 'payment' under CIPAA because there was no claim nor due date for payment arising thereto in respect of a claim for loss and expense under application for EOT Nos. 1, 2, 3 and 4 in the payment claim which was the subject matter of OS 170; (b) did not decide on MRCB's entitlement under the ambit of the payment claim, *ie*, allegedly the terms of the conditions of contract ('COC') and MRCB's position that it had complied with and fulfilled the requirements of the contract in advancing the claim. The adjudicator had instead decided on a new issue of waiver ('issue (ii)(b)'); (iii) whether the adjudicator had breached the natural justice (a) by depriving TNB the right to be heard on newfound issues raised or averments in the adjudication reply *vis-a-vis*, *inter alia* the alleged representations by TNB to waive and forgo strict compliance with the notice requirement and the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 as well as cl. 24 of the COC; (b) by failing to consider TNB's argument on quantum ('issue (iii)(b)'); (iv) whether the adjudication decision ought to be enforced; and (v) whether the adjudication decision ought to be stayed.

Held (dismissing OS 170 and OS 171; allowing OS 172):

(1) The words 'dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the court' under s. 37 of the CIPAA does not in its plain and unambiguous meaning restrict any such disputes with regards to payment under a construction contract (as defined in CIPAA) to only where either the adjudication proceedings, or the arbitration proceedings or the proceedings in court are to be limited by the word 'concurrently'. The word 'may' as opposed to the word 'shall' used in the said section denotes that all or any of the adjudication proceedings, arbitration proceedings or court

proceedings could be commenced at any one time without the adjudication proceedings had to be commenced prior to either the arbitration proceedings or court proceedings for CIPAA to take effect. There was no need to see adjudication and arbitration as mutually exclusive to each other. To give the said section a restrictive approach would be against the spirit and purpose of CIPAA which was to alleviate cash flow issues by providing an effective and economical mechanism. This is also fortified by the words in s. 37(2) of the CIPAA which reiterates that 'a reference to arbitration or the court in respect of a dispute which is being adjudicated shall not bring the adjudication proceedings to an end nor affect the adjudication proceedings' which clearly denotes that any adjudication proceeding is not brought to an end when there is a reference to either the arbitration or courts. Conversely this, it could only mean that the adjudication proceedings could also be brought at any time before the dispute was finally settled either at the arbitration or the courts. (paras 22, 24-25 & 27)

(2) The payment claim and the letters (MRCB's covering letter for OS 170 and payment claims) when read together, complied with the requirements as per s. 5(2) of the CIPAA. Be that as it may, the court was in total agreement with MRCB that adjudication proceedings require a degree of informality. Thus, the limiting of the details and/or the claims to purely the payment claim as per its form was merely unnecessarily constricting and/or restricting the adjudication proceedings. Other than that, the court was also in agreement with the statement made by the learned authors of '*Construction Adjudication in Malaysia* (3rd edn)' that stated that the Form 1 in the sample of the payment claim provided by AIAC was 'intended to merely highlight the matters and procedures which the relevant parties may have to consider when taking the steps in question'. Hence, a strict compliance with Form 1 was not necessary for there to be compliance with s. 5(2) of the CIPAA. As long as there was a document annexed or attached to and formed part of the Form 1 which could suitably explain and identify the details and information required, the said document or letter could form part of the payment claim. (paras 34 & 36-37)

(3) Issue (ii)(b) was misconceived. At p. 3 of the AD, the adjudicator had mentioned that '… I had decided that the respondent's allegation of 'new matters' being raised in the adjudication reply were unfounded and therefore it was not necessary for any rejoinder in the alleged new matters'. In the AD, the adjudicator had also found that MRCB had merely 'brush off figures/quantum and facts using mere words and denials' and that TNB's insistence on MRCB strictly adhering to the prescribed format in submitting and preparing claims for its assessment is unreasonable' and concluding that 'there are many acceptable

procedures and formats to prepare and admit claims in construction contracts' and stating that '… such strictness can be remedied and waived through agreement between the parties. The respondent (TNB) *vide* its letter dated 16 April 2020 had essentially agreed to waive the notice requirement for loss and expense'. Therefore, it was held that the adjudicator had acted within his jurisdiction on the issue of 'waiver' as this was decided by the same with reference to MRCB's claim for loss and expense which MRCB alleged was not certified by TNB which the adjudicator had consequently found that TNB *vide* its letter dated 16 April 2020 had essentially agreed to waive the notice requirement for loss and expense thus negating the argument by TNB regarding the strict compliance with cl. 24 of the COC. (paras 39-42)

(4) The adjudicator had taken the position that the CIPAA does not provide for a rejoinder. Under s. 25(a) of the CIPAA, it was within the powers of the adjudicator to decide on whether to allow a rejoinder. Relying on the case of *Integral Acres Sdn Bhd v. BCEG International (M) Sdn Bhd & Other Cases*, TNB does not have a right to file a rejoinder as no such right appears in CIPAA which only provides for the filing of the adjudication claim, adjudication reply and adjudication response pursuant to ss. 9(1), 10(1) and 11(1) of the CIPAA, respectively. The issue on the alleged failure of the adjudicator to assess cl. 24 of the COC as contended by TNB had been considered. It had also been found in paras. 5.24 to 5.33 of the AD, which must be read *in toto*, that the adjudicator had, among others, after examining the relevant evidence, found that MRCB 'had complied with the requirement under cl. 24 COC and other clauses incidental thereto' and the Movement Control Order (MCO) and the non-reference to the said clause was unreasonable *vis-à-vis* MRCB having to 'strictly adhere to its prescribed format in submitting and preparing its claims for its assessment ...'. There were sufficient reasons given by the adjudicator which complied with the requirement under s. 12(4) of the CIPAA which was to provide reasons in the AD. The contention that the adjudicator had not provided reasons or justifications in his reasoning pertaining this issue was therefore held as misconceived. Be that as it may, this challenge as to the merits of the AD was nevertheless not allowed under s. 15 of the CIPAA. (paras 45-49 & 51)

(5) In respect to issue (iii)(b), the adjudicator had addressed himself to this issue at various parts of the AD, namely paras. 5.24 to 5.37 rather extensively and analysed the issues and documents raised before finally concluding his decision on this point. Nevertheless, these were mere challenges to the merits of the AD which was not allowed under s. 15

of the CIPAA, and that even if there were errors of fact or law, these do not amount to a denial of natural justice as any alleged prejudice due to the adjudicator's decision not to allow filing of a rejoinder could be addressed or remedied in the arbitration proceedings. (paras 54, 55 & 57)

(6) Adjudication proceedings require tight time constraints and swift, rapid and quick decisions on the part of the adjudicator which requires a degree of informality. It does not require the same standard as that in a court litigation in so far as the strict rules of pleadings. In conclusion, it was found that the adjudicator had considered the issues raised and had in depth looked into the arguments, submissions and contentions before coming to his findings and decision in the AD. As such, they were not subject to any appeal. Hence, there were no irregularities in the respective payment claims nor any breach of natural justice in the AD. OS 170 was therefore dismissed, while OS 172 was granted. (paras 59-61)

(7) There was no basis for special circumstances shown in support of OS 171. Even if there was, the court was bound to dismiss OS 171 since the AD had been ordered to be enforced pursuant to s. 28 of the CIPAA. The broad reasons for rejecting the stay were also premised on the facts that: (i) the existence of the arbitration proceedings by itself does not warrant a stay to be granted; (ii) there were no clear errors in the AD; and (iii) the justice of the case does not justify any stay to be granted. Therefore, it was held that OS 171 to be dismissed, and the issues and grounds for OS 171 were ordered to be properly decided in the arbitration proceedings. Any alleged issues or errors, if any, could be corrected in the said arbitration proceedings. (paras 65, 66 & 68)

Case(s) referred to:

ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal [2016] CLJU 1522; [2016] 1 LNS 1522 CA ***(refd)***

BM City Realty & Construction Sdn Bhd v. Merger Insight (M) Sdn Bhd & Another Case [2016] CLJU 1096; [2016] 1 LNS 1096 HC ***(refd)***

Econpile (M) Sdn Bhd v. ASM Development (KL) Sdn Bhd & Another Appeal [2024] CLJU 609 FC ***(refd)***

Econpile (M) Sdn Bhd v. IRDK Ventures Sdn Bhd & Another Case [2016] 5 CLJ 882 HC ***(refd)***

Giatreka Sdn Bhd v. SGW Engineering Construction Sdn Bhd & Another Case [2019] CLJU 1876; [2019] 1 LNS 1876 HC ***(refd)***

Integral Acres Sdn Bhd v. BCEG International (M) Sdn Bhd & Other Cases [2021] CLJU 1620; [2021] 1 LNS 1620 HC ***(refd)***

JKP Sdn Bhd v. Anas Construction Sdn Bhd & Another Appeal [2022] 10 CLJ 528 CA ***(refd)***

Krishnadas Achutan Nair & Ors v. Maniyam Samykano [1997] 1 CLJ 636 FC ***(refd)***

Leap Modulation Sdn Bhd v. PCP Construction Sdn Bhd [2018] CLJU 816; [2018] 1 LNS 816 CA ***(refd)***

LP Capital Construction Sdn Bhd v. TKJ Builders Sdn Bhd [2020] CLJU 1464; [2020] 1 LNS 1464 HC ***(refd)***

Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal [2019] 8 CLJ 433 FC ***(refd)***
Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***
SKS Pavillion Sdn Bhd v. Tasoon Injection Pile Sdn Bhd [2019] 2 CLJ 704 HC ***(refd)***

Legislation referred to:
Construction Industry Payment and Adjudication Act 2012, ss. 5(2), 9(1), 10(1), 11(1), 12(4), 15(b), (d), 16(1)(a), (b), 25(a), 28, 37(2)
Rules of Court 2012, O. 69A r. 5, O. 92 r. 4

For the plaintiff - Mohanadass Kanagasabai, Kalashini Sandrasegaran & Thomas Shaun Mathews; M/s Mohanadass Partnership
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Reported by Syamim Ariffin

JUDGMENT
(encl. 1)

Nadzarin Wok Nordin J:

Introduction

[1] Under Originating Summons No. WA-24C-170-09/2022 (OS 170), Tenaga Nasional Berhad ("TNB") is seeking to set aside the adjudication decision dated 4 August 2022 under Adjudication Reference No. AIAC/D/ADJ-4189-2022 (OS 170 AD) delivered by the learned adjudicator, Ir Dr Wong Fook Keong (Ir Wong), which was obtained by Malaysian Resources Corporation Berhad ("MRCB") for the sum of RM15,537,694.33 together with interest and costs pursuant to s. 15(b) and/or (d) of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA").

[2] In Originating Summons No. WA-24C-171-09/2022 (OS 171), TNB had applied to this court to, *inter alia*, stay the said AD pending the outcome of OS 170 and/or the final disposal of the Arbitration Proceedings Reference No. AIAC/D/ADM-1084-2022 between the parties.

[3] Finally, in Originating Summons No. WA-24C-172-09/2022 (OS 172), MRCB had applied to, amongst others, enforce the AD as though it was a judgment of the court in accordance with s. 28 of the CIPAA.

[4] The grounds in support of OS 170 are briefly as follows:

(i) the adjudicator did not have the absolute jurisdiction to hear the matters in the payment claim dated 11 February 2022 (payment claim);

(ii) alternatively, the adjudicator has exceeded his jurisdiction under s. 15(d) of the CIPAA;

(iii) the adjudicator has breached natural justice and thereby breached s. 15(b) of the CIPAA.

[5] OS 171 was supported on the, *inter alia*, the following grounds:

(i) TNB has simultaneously with OS 171 filed the application in OS 170;

(ii) the subject matter of the adjudication is still pending the final disposal of the arbitration proceedings initiated by MRCB against TNB in AIAC/D/ADM-1084-2022;

(iii) the arbitration proceedings had been commenced five months before the payment claim dated 11 February 2022 in the adjudication;

(iv) the arbitrator will determine the entire dispute between the parties herein including that in the adjudication proceedings;

(v) the arbitration proceedings have begun smoothly;

(vi) the AD has various clear and substantial errors therein which give support for a stay of the AD;

(vii) the stay of the AD ought to be given to achieve justice between the parties.

[6] As to OS 172, the grounds mentioned in support thereto were that:

(i) MRCB has demanded from TNB the adjudicated sum under the AD;

(ii) the AD has yet to be paid by TNB;

(iii) MRCB has complied with the procedure under O. 69A r. 5 of the Rules of Court 2012.

Brief Background Facts

[7] The arbitration is well underway. The hearing has been scheduled to take place on 6, 7, 8, 27 and 28 February 2023 and 2, 3, 13, 14, 15, 16 and 17 March 2023.

[8] It is only after the initiation of the arbitration and despite there being a significant passage of time (by more than two years) since the issuance of the CPC, certifying that the project was practically completed on 31 July 2019, that MRCB resorted to pursuing five separate adjudication proceedings pursuant to CIPAA – including the adjudication – against TNB in respect of the very same claims that form the subject matter of the arbitration.

[9] MRCB only succeeded in full, in one of the adjudication proceedings. All four remaining adjudication proceedings (inclusive of this adjudication) were only allowed in part or dismissed. A summary of the outcome is as follows:

CIPAA	Adjudication Reference No.	Amount Claimed (RM)	Amount Awarded (RM) (excl. interest and costs)
1	AIAC/D/ADJ4204-2022	RM3,129,946.01	RM675,128.95
2	AIAC/D/ADJ4186-2022	RM11,601,149.05	Nil
3	AIAC/D/ADJ4188-2022 *ie*, the Adjudication	RM3,003,479.03	RM1,255,527.70
4	AIAC/D/ADJ4189-2022	RM15,537,694.33	RM15,537,694.33
5	AIAC/D/ADJ4237-2022	RM1,519,037.10	RM86,521.37

[10] The afore-identified decisions (with the exception of CIPAA 2) are now subject to further challenge in the High Court of Kuala Lumpur in the form of setting aside applications pursuant to the inherent jurisdiction of the Honourable Court and/or s. 15(b) and/or 15(d) of the CIPAA and/or O. 92 r. 4 of the Rules of Court 2012 and stay applications pursuant to s. 16(1)(a) and/or 16(1)(b) of the CIPAA and/or the inherent jurisdiction of the Honourable Court.

[11] MRCB has applied for the enforcement of each of the afore-identified decisions (with the exception of CIPAA 2) pursuant to s. 28 of the CIPAA.

[12] The details are as follows:

CIPAA	Case Number	Court	Hearing Date
1	Setting Aside: WA-24C-165-08/2022 ("OS 165") Stay: WA-24C-166-08/2022 ("OS 166") Enforcement: WA-24C-167-08/2022 ("OS 167")	KL Construction Court 2	Setting Aside: 3.3.2023 Stay: 3.3.2023 Enforcement: 3.3.2023
2	Setting Aside: WA-24C-160-08/2022 ("OS 160") Stay: WA-24C-161-08/2022 ("OS 161") Enforcement: WA-24C-162-08/2022 ("OS 162")	KL Construction Court 1	Setting Aside: 17.1.2023 Stay: 21.11.2022 & 20.1.2023 Enforcement: 17.1.2023
3	Setting Aside: WA-24C-170-09/2022 ("OS 170") Stay: WA-24C-171-09/2022 ("OS 171") Enforcement: WA-24C-172-09/2022 ("OS 172")	KL Construction Court 1	Setting Aside: 10.1.2023 Stay: 25.11.2022 & 19.1.2023 Enforcement: 10.1.2023

4	Setting Aside: WA-24C-183-09/2022 ("OS 183") Stay: WA-24C-184-09/2022 ("OS 184") Enforcement: WA-24C-186-09/2022 ("OS 186")	KL Construction Court 2	Setting Aside: 26.1.2023 Stay: 26.1.2023 Enforcement: 26.1.2023

[13] Learned counsels for the respective parties had agreed for all of the aforementioned matters to be heard together as it involved the same set of substantive facts and issues as well as the exact similar parties.

Court's Findings

Alleged Lack Of Jurisdiction

[14] TNB is submitting, amongst others, that Ir Wong (adjudicator) had lacked absolute jurisdiction when the adjudicator had wrongly continued with the adjudication when the dispute was already brought to arbitration *ie*, arbitration had commenced before the adjudication. It was contended that s. 37 of the CIPAA did not permit commencement of proceedings under CIPAA after the commencement of an arbitration.

[15] Section 37 of the CIPAA provides:

> (1) A dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the court.
>
> (2) Subject to subsection (3), a reference to arbitration or the court in respect of a dispute which is being adjudicated shall not bring the adjudication proceedings to an end nor affect the adjudication proceedings.

[16] MRCB in reply stated that s. 37 of the CIPAA does not mean the adjudication and arbitration proceedings must be simultaneous and that this issue was raised before the adjudicator.

[17] I have been shown that the respective adjudicators when considering the jurisdictional challenge had decided that:

> (b) The Respondent's jurisdictional challenge may be the Respondent's own interpretation of the provisions of CIPAA and the Arbitration Act 2005 and which is for a court of law to decide. There may be other post - *LP Capital Construction Sdn Bhd v. TKJ Builders Sdn Bhd* decisions but the Respondent did not provide any such authority to support its interpretation or contention ...
>
> (d) Notwithstanding Paragraph 5.3(b) above, I shall exercise my discretion pursuant to s. 27(3) of CIPAA to proceed and complete this adjudication proceeding and by doing so, I do not see any disadvantage being caused to either the Claimant or the Respondent.

[18] I have also read the various cases cited to me by learned counsel for MRCB being: A

(i) *LP Capital Construction Sdn Bhd v. TKJ Builders Sdn Bhd* [2020] CLJU 1464; [2020] 1 LNS 1464; [2021] 7 MLJ 753 where the court held:

> [19] It is not disputed that the said section above does confer power on the Courts as a final arbitrator to the dispute but the principles in the case of *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd* [2016] MLJU 1051; [2017] 1 MLRH 440 (HC); *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd And Another Appeal* [2018] 4 MLJ 496; [2018] 6 MLRA 210 (CA); *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd And Another Appeal* [2020] 6 MLJ 224; [2019] 5 MLRA 584 (FC) shows that the second CIPAA proceedings and the suit in High Court 2 does not amount to an abuse process due to multiplicity of proceedings. They can exist concurrently and they do not flow on the same track with the first having only a temporary binding effect that serves the Parliament's intention when enacting the same *ie*, the adjudication that is offered through CIPAA is a simple, fast and cheap mechanism for resolving payment problems or payment disputes faced by construction industry as opposed to the existing resolution through arbitration or the courts. As arbitration and courts are time consuming and costly, adjudication is an additional option that may be concurrently invoked. CIPAA only deals with payment and how to secure the payment. B C D E

(ii) *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal* [2019] 8 CLJ 433; [2020] 6 MLJ 224 where the Federal Court held:

> [76] We are not persuaded. We are fully in agreement with the learned High Court judge that there is nothing to stop the CIPAA 2012 from applying to the case at hand and there is no need to see adjudication and arbitration to be mutually exclusive to each other. At pp 615-616, R/R (Jld 6) of his ground of judgment, the learned High Court judge stated: F

> > [76] I agree that the dispute resolution mechanism under CIPAA is by way of adjudication and the statutory requirement for dispute resolution under the Architects Act is by way of Arbitration. I must also state that there is nothing strange in this difference as statutory adjudication came into being only with the coming into force of CIPAA on 10 April 2014 and that there is no need to see adjudication and Arbitration to be mutually exclusive of each other as adjudication would only yield a decision of temporary finality and it is only with Arbitration or Litigation that one gets a final and binding decision. The whole scheme of statutory adjudication was never intended to be set in opposition to Arbitration or Litigation. Adjudication operates independently on a separate G H I

A track and indeed a fast track and it will not run into collision with Arbitration or Litigation simply because its track is different. Before there was adjudication, there were already Arbitration and Litigation. After the introduction of adjudication, both Arbitration and Litigation will still continue except that now there is an additional dispute resolution B mechanism of temporary finality that can be embarked upon before or concurrently with Arbitration or Litigation as the case may be. Thus one need not have to choose in an 'either or' approach between adjudication and Arbitration but one can proceed in a 'both and' approach in resolving a dispute on an C architect's claim against his client for his professional fees. Adjudication under CIPAA was never designed to be in conflict with Arbitration and Litigation and so its process may be activated at any time where there is a valid payment claim under a construction contract. Premised on that proper perspective, the question of which would prevail over the other D does not arise at all.

...

[78] Further, s. 37 of the CIPAA 2012 provides that an adjudication proceeding, arbitration and court litigation may proceed concurrently and in parallel. It is also apparent that adjudication is E a mandatory procedure under the CIPAA 2012 and the right to statutory adjudication should not be circumvented by any contract where parties have agreed to arbitrate.

[19] In support of the opposition on this point raised by TNB, this court was once again referred to in *Martego* (*supra*) to show that CIPAA is limited F to adjudication proceedings initiated before or concurrent to reference to arbitration.

[20] In interpreting a statute, the Federal Court had in *Krishnadas Achutan Nair & Ors v. Maniyam Samykano* [1997] 1 CLJ 636; [1997] 1 MLJ 94, with regards the interpretation of a statute held that:

G The function of a Court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. *Prima facie*, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. H A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant. It must be borne in mind that:

As a general rule a Court will adopt that construction of a statute which will give some effect to all of the words which it contains. Per Gibbs J in *Beckwith v. R* [1976] 12 ALR 333, at p. 337. I

[21] I further rely on the case of *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177, Augustine Paul FCJ said at p. 200:

> *Thus when the language used in a statute is clear effect must be given to it*. As Higgins J said in *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* [1920] 28 CLR 129 at pp. 161-162:
>
> > *The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense it is our duty to obey that meaning* even if we think the result to be inconvenient, impolite or improbable.
>
> *The primary duty of the court is to give effect to the intention of the Legislature as expressed in the words used by it and no outside consideration can be called in aid to find another intention* (see *Nathu Prasad v. Singhai Kepurchand* [1976] Jab LJ 340). Thus the duty of the court, and its only duty, is to expound the language of a statute in accordance with the settled rules of construction and has nothing to do with the policy of any statute which it may be called upon to interpret (see *Vacher & Sons Ltd v. London Society of Compositors* [1913] AC 117; *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1986] 1 LNS 79; [1987] 1 MLJ 39).
>
> (emphasis added)

[22] Thus, from my reading of the entire s. 37 of the CIPAA, together with the *ratios* in *LP Capital Construction Sdn Bhd* (*supra*) and in particular the *ratio* in *Martego Sdn Bhd* (*supra*), I hold that the words "dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the court" in its plain and unambiguous meaning does not restrict any such disputes with regards payment under a construction contract (as defined in CIPAA) to only where either the adjudication proceedings, or the arbitration proceedings or the proceedings in court is to be limited to the word 'concurrently'.

[23] My reason for the above, is that the Federal Court in *Martego* (*supra*) has indicated, and which I hold is applicable herein, that the "process may be activated at any time where there is a valid payment claim under a construction contract" and that "... one need not have to choose in an 'either or' approach between adjudication and arbitration but one can proceed in a 'both and' approach in resolving a dispute ...".

[24] The word 'may' as opposed to the word 'shall' which is used and referred to in the said section also denotes that all or any of the adjudication proceedings, arbitration proceedings or court proceedings can be commenced at any one time without the adjudication proceedings having to be commenced prior to either the arbitration proceedings or court proceedings

for CIPAA to take effect. There is therefore, to borrow the words of the High Court and Federal Court Judges in *Martego Sdn Bhd* (*supra*), no need to see adjudication and arbitration to be mutually exclusive to each other.

[25] I therefore do not hold that the said s. 37 of the CIPAA restricts that the adjudication must be commenced prior to an arbitration, and to give such a restrictive approach, in my view, would be against the spirit and purpose of CIPAA which is to alleviate cash flow issues by providing an effective and economical mechanism as per *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal* [2019] 8 CLJ 433; [2020] 6 MLJ 224 where it was held by the Federal Court amongst others that:

> ... the interpretation expounded by the majority of the Court of Appeal in that case was consistent with the purpose and structure of the adjudication process outlined in the CIPAA 2012. It was clear from the Preamble, the Explanatory Notes to the Bill and the speech of the Deputy Minister when tabling the CIPAA Bill that the primary objective of the CIPAA 2012 was to alleviate cash flow issues by providing an effective and economical mechanism.

[26] It would further in my findings go against the very words of s. 37 of the CIPAA if this court were to add or read words into the said section when no such words exist and which, in my view, is against Parliament's intention as expounded above. For an authority in this point, see *Martego Sdn Bhd* (*supra*), where the Federal Court also held:

> [57] It is well-established principle of interpretation that the court cannot rewrite, recast or reframe the legislation because it has no power to do so. **The court cannot add words to a statute or read words which are not there** (emphasis added). It is also well settled canon of construction that words in a statute cannot be read in isolation, their colour and content derived from their context and every words in a statute is to be examined in its context. The word context has to be taken in the widest sense where the court must take into consideration not only the enacting provisions of the same statute, but its preamble, the existing state of law, other statutes in *pari materia*, and the mischief which the statute is intended to remedy. In *Reserve Bank of India v. Peerless General Finance And Investment Co Ltd* [1987] SCR (2) 1, Chinnappa Reddy J said:
>
> > Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when the object and purpose of its enactment is known. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute maker, provided by such context its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute

> is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.
>
> (emphasis added)

[27] I also hold that my above decision is fortified by the words in s. 37(2) of the CIPAA which reiterates that 'a reference to arbitration or the court in respect of a dispute which is being adjudicated shall not bring the adjudication proceedings to an end nor affect the adjudication proceedings' which clearly denotes that any adjudication proceedings is not brought to an end when there is a reference to either an arbitration or the courts. Conversely this, when read with the authorities herein before mentioned, can only mean that the adjudication proceedings can also be brought at any time before the dispute is finally settled either at arbitration or the courts.

Adjudicators Alleged Excess Of Jurisdiction

[28] In terms of the respective adjudicators excess of jurisdiction, TNB had argued that the payment claim issued by MRCB for OS 170 is not in compliance or within the parameters of s. 5(2) of the CIPAA and that one of the category of claims advanced by MRCB did not fall within the definition of 'payment' under CIPAA as there is no claim nor due date for payment arising thereto in respect of a claim for loss and expense under application for EOT Nos. 1, 2, 3 and 4 in the payment claim which is the subject matter of OS 170.

[29] MRCB in return submits that the issues raised on the excess of jurisdiction issue as one which goes to the merits of the AD and does not fall within s. 15 of the CIPAA which reads:

> An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:
>
> (a) the adjudication decision was improperly procured through fraud or bribery;
>
> (b) there has been a denial of natural justice;
>
> (c) the adjudicator has not acted independently or impartially; or
>
> (d) the adjudicator has acted in excess of his jurisdiction.

[30] This court has now had the opportunity to examine the payment claim in exh. TNB 6 of OS 170, which is the subject matter under OS 170, and finds that there is MRCB's covering letter dated 10 February 2022 for the aforesaid OS's and the payment claims attached thereto.

[31] In coming to the decision on this issue, this court has read the cases relied on by learned counsel for TNB and hold as follows:

(i) *JKP Sdn Bhd v. Anas Construction Sdn Bhd & Another Appeal* [2022] 10 CLJ 528; [2022] 6 MLJ 503 concerned a case where the Court of Appeal held that cl. 36.6 of the contract relied on therein was not stated in the payment claim, and thus it was clear that the requirements under s. 5(2) of the CIPAA were not complied with and that the failure to state that the respondent was relying on cl. 36.6 of the contract in the PC was a clear manifestation of statutory non-compliance.

(ii) the High Court's decision in *SKS Pavillion Sdn Bhd v. Tasoon Injection Pile Sdn Bhd* [2019] 2 CLJ 704; [2019] 9 MLJ 396 where it was *inter alia* held that the adjudicator did not have jurisdiction as the payment claim did not state the due date for payment of amount claimed and that the due date for payment was essential for a cause of action, as it was only if this date had passed that the defendant had an accrued cause of action. Therefore, the payment claim must state the cause of action that the defendant relied on, as the adjudication's jurisdiction was limited to the cause of action stated in the payment claim.

(iii) *Giatreka Sdn Bhd v. SGW Engineering Construction Sdn Bhd & Another Case* [2019] CLJU 1876; [2019] 1 LNS 1876; [2019] MLJU 1477 which was another High Court case where Lim Chong Fong J (as he then was) held:

> [36] In my opinion, *albeit* the CIPAA is permissive on the right of party representation whether by advocates and solicitors, claims consultants or even the disputant party itself, the prescribed requirements of the statute, particularly those pursuant to ss. 5(2), 6(2), 9(1), 10(1) and 11(1) of the CIPAA, must however be strictly met. There should be no relaxation based on the quality of the representation. I have also noticed that the Asian International Arbitration Centre, being the adjudication Authority under the CIPAA has, towards this end, published *A Practical Guide to Statutory Adjudication in Malaysia* which contains specimen forms especially to assist lay self-represented disputants in the conduct of CIPAA adjudication proceedings. If the lay disputant is not competent to handle these prescribed requirements, then it is best to seek professional representation. The non compliance of the prescribed requirements cannot be excused for laxity on the part of the disputant party.

[32] With respect, I do not find that any of the above cases aforementioned has the same factual matrix as the one before this court and that the decisions in the said courts only emphasised the need for compliance with s. 5 of the CIPAA without stating that the payment claim must be in any exact prescribed form.

[33] I have also taken into account the words of s. 5(2) of the CIPAA which states:

> (2) The payment claim shall be in writing and shall include:
>
> (a) the amount claimed and due date for payment of the amount claimed;
>
> (b) details to identify the cause of action including the provision in the construction contract to which the payment relates;
>
> (c) description of the work or services to which the payment relates; and
>
> (d) a statement that it is made under this Act.

[34] On my part, I hold that the said payment claim and the letters are to be read together and that it is in compliant with the requirements as per s. 5(2) of the CIPAA, as the aforesaid documents show that:

(i) the issues and cause of action are clearly ascertainable and in accordance with s. 5(2) of the CIPAA *ie*, in respect of OS 170 relating to the non-certification of MRCB's loss and expense claim where the various EOT's were referred to together with cl. 24 of the conditions of contract, issues arising from the final account, Interim Payment Application No. 41 and the corresponding Certificate of Payment No. 37 (revised);

(ii) the claim is in writing;

(iii) the due dates of payment have been expressly referred to in the payment claim under the column headed 'due dates for payment';

(iv) the description of the work or services *vis-à-vis* the variation works under the project;

(v) the statement that the payment claim was pursuant to s. 5 of the CIPAA;

(vi) there are references to the applicable clauses in the contract.

[35] This court has also found in respect of OS 170, that Ir Wong, the adjudicator, had noted this point at the OS 170 AD but had not made any ruling on this.

[36] Be that as it may, I am reminded and am in total agreement with learned counsel to MRCB that an adjudication proceeding requires a degree of informality, see para. 50 of the Federal Court's grounds in *Martego Sdn Bhd* (*supra*). Thus, the limiting of the details and/or the claims to purely the payment claim as per its form is in my view merely unnecessarily constricting and/or restricting the adjudication proceedings.

[37] I am also in agreement with the statement made by Lam Wai Loon and Ivan Foo in their book entitled "*Construction Adjudication in Malaysia*" 3rd edn that Form 1 in the sample of the payment claim provided by AIAC

is "... intended to merely highlight the matters and procedures which the relevant parties may have to consider when taking the steps in question." Thus, I hold that strict compliance with Form 1 is not necessary for there to be compliance with s. 5(2) of the CIPAA. I hold that so long as there is a document which is annexed to or is attached to and forms part of Form 1 which can suitably explain and identify the details and information required, the said document or letter can form part of the payment claim.

Alleged Waiver Not Pleaded

[38] TNB had argued that the adjudicator did not decide on MRCB's entitlement under the ambit of the payment claim *ie*, allegedly the terms of the conditions of contract (COC) and MRCB's position that it had complied with and fulfilled the requirements of the contract in advancing the claim but that he had decided on a new issue of waiver.

[39] I find that this issue is misconceived as this issue appears in the adjudication claim and that in the AD the adjudicator made his findings on the issue of 'waiver' after going through the lengthy documents, including the COC in particular cl. 24 thereto on the alleged mandatory requirements for loss and expense claims and the communications and letters thereto, amongst others, the alleged delays and the EOT applications submitted by MRCB, the Movement Control Order which was in effect at that time and submissions of the parties on this point.

[40] At p. 3 of the AD, the adjudicator had further mentioned that "... I had decided that the respondent's allegation of 'new matters' being raised in the adjudication reply were unfounded and therefore it was not necessary for any rejoinder on the alleged new matters".

[41] The adjudicator had in the AD also found that MRCB had merely "brush off figures/quantum and facts using mere words and denials" and that TNB's "insistence on MRCB strictly adhering to the prescribed format in submitting and preparing claims for its assessment is unreasonable" and concluding that "there are many acceptable procedures and formats to prepare and admit claims in construction contracts" and stating that "... such strictness can be remedied and waived through agreement between the parties. The respondent (TNB) *vide* its letter dated 16 April 2020 had essentially agreed to waive the notice requirement for loss and expense".

[42] I thus do hold that the adjudicator had acted within his jurisdiction on the issue of 'waiver' as this was decided by the adjudicator with reference to MRCB's claim for loss and expense which MRCB alleges were not certified by TNB and which the adjudicator had consequently found that TNB had *vide* its letter dated 16 April 2020 had essentially agreed to waive the notice requirement for loss and expense thus negating the argument of strict compliance with cl. 24 of the COC which was argued by TNB.

Alleged Breach Of Natural Justice

[43] On the issue of alleged breach of natural justice contended by TNB when the adjudicator had allegedly deprived TNB of being heard on newfound issues raised or averments in the adjudication reply, *vis-à-vis*, *inter alia*, the alleged representations by TNB to waive and forgo strict compliance with the notice requirement and the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 as well as cl. 24 of the COC.

[44] From the facts before this court, it would appear that the adjudicator had ordered TNB to submit its arguments regarding the said issue *vide* the adjudicator's email of 3 June 2022, as seen in exh. TNB 41 of encl. 26 in OS 170, which was responded to by TNB on 16 June 2022.

[45] It is also found from the documents before this court that there were exchanges of letters/emails dated 3 June 2022, 22 June 2022, 24 June 2022 and 28 June 2022 on this point, with the adjudicator taking the position that CIPAA does not provide for a rejoinder, as shown at encl. 23 exh. TNB 25 of OS 170, and refused the said request.

[46] On this issue, I hold that it was within the powers of the adjudicator to decide on whether to allow a rejoinder as s. 25(a) of the CIPAA provides that:

> The adjudicator shall have the powers to:
>
> (a) establish the procedures in conducting the adjudication proceedings including limiting the submission of documents by the parties; ...

[47] I further rely on *Integral Acres Sdn Bhd v. BCEG International (M) Sdn Bhd & Other Cases* [2021] CLJU 1620; [2021] 1 LNS 162; [2021] MLJU 1889 that TNB does not have a right to file a rejoinder as no such right appears in CIPAA which only provides for the filing of the adjudication claim, adjudication reply and adjudication response as per ss. 9(1), 10(1) and 11(1) of the CIPAA respectively.

[48] I have in coming to my decision also considered the issue of the alleged failure by the adjudicator therein to assess cl. 24 of the conditions of contract as contended by TNB and find that based on my perusal of the relevant AD, in particular paras. 5.24 to 5.33 therein, which must be read *in toto*, the adjudicator had amongst others, as earlier mentioned above, after examining the relevant evidence before him, found that MRCB "had complied with the requirement under cl. 24 COC and other clauses incidental thereto" and that the Movement Control Order (MCO) and the non-reference to the said cl. 24 COC was unreasonable *vis-à-vis* MRCB having to "strictly adhere to its prescribed format in submitting and preparing its claims for its assessment ...".

[49] The above are in my view sufficient reasons given by the adjudicator which complies with the requirement under s. 12(4) of the CIPAA to provide reasons in the AD, and thus I hold that the contention that the adjudicator therein had not provided reasons or justifications in his reasoning on this issue is misconceived.

[50] In any event, I note that there is a letter dated 16 April 2016 which purportedly agrees to waive the requirement of notice as found in encl. 8 of OS 170.

[51] Be that as it may, I hold that this is a challenge to the merits of the AD which is not allowed under s. 15 of the CIPAA.

Challenge As To Quantum

[52] It was also alleged by TNB that the adjudicator had failed to consider TNB's argument on quantum. On this, the adjudicator had in the AD, *inter alia*, perused the documents and procedure referred to by the respective parties, submissions and in particular to cl. 24 of the COC and the incidental clauses thereto, the issuance of the notice of intention to claim for EOT's and additional expenses incurred by variation, the claim for loss and expenses pursuant to the said clause as well as the notification thereto and its breakdown and found that cl. 24 of the COC and the incidental clauses thereto were complied with by MRCB.

[53] Amongst the reasons given by the adjudicator in his decision on the quantum is the degree of informality and burden of proof on the claimant in CIPAA proceedings were less stringent as compared to court proceedings.

[54] It is my conclusion, after reading the relevant parts of the AD, that the adjudicator had addressed himself to this issue at various parts of the AD namely paras. 5.24 to 5.37 rather extensively and analysed the issues and documents raised before finally concluding with his decision on this point.

[55] It is my finding that these are again mere challenges to the merits of the AD which is not allowed under s. 15 of the CIPAA and that even if there are errors of fact or law, these do not amount to a denial of natural justice, see for example *BM City Realty & Construction Sdn Bhd v. Merger Insight (M) Sdn Bhd & Another Case* [2016] CLJU 1096; [2016] 1 LNS 1096 where the court held:

> [62] I agree with learned counsel for MISB that even if there was a failure to take into account of payment made to the NSCs, it is merely an error of findings of facts/law. Such an error does not require the adjudication Decision to be set aside. There will not be a denial of natural justice if the adjudicator had addressed all the right issues even in the wrong way. The adjudicator's decision will nevertheless be temporary binding. It is only when the adjudicator has answered the wrong issues that his decision will be a nullity. See *Bouygues (UK) Ltd v. Dahl-Jensen (UK) Ltd* [2001] 1 All ER (Comm) 1041; *Bina Puri Construction Sdn Bhd v. Hing Nyit Enterprise Sdn Bhd* [2015] 8 CLJ 728.

[56] In respect of the above principle, see also the case of *ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal* [2016] CLJU 1522; [2016] 1 LNS 1522 where the Court of Appeal held:

> ... In the context of s. 15 of CIPPA 2012, it cannot be the function of the Court to look into or review the merits of the case or to decide the facts of the case. The facts are for the adjudicator to assess and decide on. The Court's function is simply to look at the manner in which the adjudicator conducted the hearing and whether he had committed an error of law during that process. Such error of law relates to whether he had accorded procedural fairness to the Appellant. In the context of this case, the complaints of the Appellant were nothing but complaints of factual findings of the adjudicator which in our view cannot be entertained by us.

[57] Any alleged prejudice due to the decision by the adjudicator not to allow the filing of a rejoinder can be addressed or remedied in the arbitration proceedings as per Lee Swee Seng J's (as he then was) judgment in the High Court case of *Econpile (M) Sdn Bhd v. IRDK Ventures Sdn Bhd & Another Case* [2016] 5 CLJ 882.

Decision On OS 170

[58] I must reiterate that the adjudication proceedings require tight time constraints which require swift, rapid and quick decisions on the part of the adjudicator which requires a degree of informality, see *Martego Sdn Bhd* (*supra*).

[59] An adjudication proceedings, in my view, do not require the same standard as that in a court litigation in so far as the strict rules of pleadings.

[60] In conclusion, this court does find that the adjudicator had considered the issues raised and had in depth looked at the arguments, submissions and contentions thereto before coming to his findings and decision in the AD. The adjudicator's decision or findings on any fact and law after going through the relevant issues, documents and submissions are not subject to any appeal.

[61] In the circumstances, I hold that there are no irregularities in the respective payment claims nor any breach of natural justice occurring in the AD before me based on my written grounds herein and I hereby dismiss encl. 1 of OS 170 with costs.

Enforcement Of Adjudication Decision

[62] As I have held that OS 170 is to be dismissed with costs, there is nothing before this court which will now prevent an enforcement of the AD since the AD has been served on TNB and TNB has to date failed, refused an/or neglected to pay the adjudicated sum.

[63] I hereby grant order in terms for the prayers in encl. 1 of OS 172.

Stay Of The Adjudication Decision

[64] This court has gone through the grounds for the stay which consists of *inter alia*:

(i) the fact that TNB has filed an application to have the AD declared null and void and be set aside;

(ii) the subject matter of the adjudication is pending final determination by an arbitration proceedings commenced by MRCB;

(iii) the arbitration proceedings were commenced more than five months prior to the service of the payment claim;

(iv) the arbitration proceedings would finally determine all outstanding disputes between the parties;

(v) the arbitration proceedings were well underway;

(vi) the AD contains clear and unequivocal errors which warrant the stay of the AD;

(vii) these clear and unequivocal errors substantially affect the outcome of the AD;

(viii) a stay of the AD ought to be granted to meet the justice of the present case.

[65] After perusal and consideration of the said grounds, this court does not find any basis for special circumstances shown in support of the OS 171. Even if there is, in light of the recent Federal Court's decision in Rayuan Sivil No. 02(f)-2-01/2023 in *Econpile (M) Sdn Bhd v. ASM Development (KL) Sdn Bhd* [2024] CLJU 609, this court is now bound to dismiss OS 171 when the AD has since been ordered by this court to be enforced under s. 28 of the CIPAA.

[66] In any event, my broad reasons for rejecting the stay are also premised on the fact that:

(i) the existence of the arbitration proceedings by itself does not warrant a stay to be granted;

(ii) I have found no clear errors in the AD as outlined in my decision above with regards the setting aside of the AD in OS 170 and in this respect, I have also not found that the justice of the case herein justifies any stay being granted.

[67] I am also minded of the reason for CIPAA which is to ensure quick payment being made in a construction dispute, see *Leap Modulation Sdn Bhd v. PCP Construction Sdn Bhd* [2018] CLJU 816; [2018] 1 LNS 816; [2018] MLJU 772.

[68] I further hold that the said issues and grounds for OS 171 are to be properly decided in the arbitration proceedings. Any alleged issues or errors, if any, could be corrected in the said arbitration proceedings.

Conclusion Of Decision

[69] Wherefore to surmise, I hereby:

(i) dismiss encl. 1 of OS 170 with costs;

(ii) allow prayers (1), (2) and (3) in encl. 1 of OS 172 with costs;

(iii) dismiss OS 171 with costs.